IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 603

WILLIAM LEVA HOUGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

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Petitioner seeks a review by this honorable court of a final decision rendered by the Supreme Court of the State of California discharging the writ of *habeas corpus* and remanding petitioner to the custody of the warden of the state prison of the State of California at San Quentin, California. (*In re Hough,* 24 A. C. 517, 150 P. 2d 448.)

Petitioner asserts that said decision does violence to the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it holds (1) that petitioner's plea of guilty was not induced by persuasion, coercion, misinformation or wrongful induce-

ment; (2) that petitioner was not legally insane when his plea was taken, or at the time evidence was introduced as to the degree of crime, or at the time judgment was pronounced; and (3) that Statutes of 1921, page 354, Chapter 245, Deering's General Laws, 1937, Act 1910, section 5, was not unconstitutional as violative of the due process clause of the Fourteenth Amendment. (Pet. for Writ of Certiorari, pp. 17-21.)

Statement of the Case.

The facts of the case are fully set forth in the decision of the Supreme Court of the State of California rendered on appeal from the judgment. (*People v. Hough,* 24 A. C. 530; 150 P. 2d 444.) In short, the facts as therein related are that petitioner shot and killed his divorced wife and the young man, Frederick L. Culp, who was with her while the latter two were seated at a table with another couple in a cafe or bar; that petitioner had previously threatened her life if he found her with any other man; that on the day of the homicide he purchased a gun in Los Angeles, went to Long Beach where she lived, waited until she came out of her residence, followed her to the amusement zone in Long Beach and then killed her with this gun. After shooting her and before being disarmed, he struck her on the head two or three times with the gun. He told the officers following his arrest, "I told her if she did not come back something would happen. I came here to kill them and, by God, I sure took

care of them." When asked at the police station if he knew his wife was dead, he replied, "I hope she is because if she is not, my time is spent in vain." The young man who was killed was not acquainted with Mrs. Hough prior to seeing her at the amusement zone a minute or two before entering the cafe, and after killing him, petitioner said, "I shot that bastard for being out with my wife. I would have shot the other man if I had not run out of ammunition."

Petitioner was accused by the Grand Jury of the County of Los Angeles, State of California, by an indictment, in Count I of the murder of Mrs. Hough and in Count II of the murder of Frederick L. Culp. The court appointed the Public Defender of Los Angeles County to represent petitioner, who plead not guilty and not guilty by reason of insanity to the charges. Three alienists were appointed by the court to examine petitioner as to his mental condition and report their examination to the court. Petitioner's trial was set for July 28, 1942. Two of these alienists reported that petitioner was sane both at the time he killed his wife and at the time of their examination of him. One of the three was unable to state whether or not petitioner was sane. He did report that in his opinion the defendant "will be legally insane at the time of the hearing set forth July 28, 1942." The trial was continued to August 11, 1942, at which time an amended indictment was filed, charging petitioner with a prior conviction of a felony in the District Court of the State of Oklahoma, of

felonious assault committed on or about the 11th day of July, 1925. On August 12, 1942, by leave of court, petitioner withdrew his pleas of not guilty and not guilty by reason of insanity and entered a plea of guilty to each of the two counts of murder charged in the amended indictment and admitted the prior conviction therein alleged. Evidence was submitted by the People and the petitioner on the question of the degree of each crime of murder to which petitioner had pleaded guilty, and the court, after being fully advised in the premises, found each crime to be murder of the first degree and imposed the death penalty. (Return to Pet. for writ of *habeas corpus; In re Hough, supra.*)

By virtue of section 1239 of the Penal Code of California, petitioner was granted an automatic appeal to the Supreme Court of California. While the appeal was pending before the court, petitioner filed a petition for a writ of *habeas corpus*. On December 27, 1943, the judgment was affirmed on appeal (*People v. Hough,* 23 A. C. 541; 144 P. 2d 518), and on said date the writ was discharged and petitioner remanded. (*In re Hough,* 23 A. C. 528; 144 P. 2d 585.) On January 24, 1944, a rehearing was granted on the appeal and on the writ. (23 A. C. No. 15, "Minutes"; 144 P. 2d 581, 585.) On July 18, 1944, the judgment was again affirmed on appeal and the writ was again discharged and petitioner remanded. (24 A. C. 518, 530; 150 P. 2d 444, 449.)

Argument.

Petitioner, on page 9 of his brief filed in support of his petition for writ of certiorari, states that he did not have counsel of his choice and did not have the effective aid of counsel because his counsel did not inform him prior to his plea of guilty that the judge had changed his mind and might possibly impose the death penalty.

There is nothing in the record which sustains the above contentions. The record shows that petitioner was represented by the Public Defender of the County of Los Angeles and that petitioner made no objections to being so represented or that he desired or requested to be represented by any other attorney. The record does not show that the trial judge prior to the plea of guilty had made up his mind to impose a sentence of life imprisonment in the event a plea of guilty was entered. The affidavit of Judge Still, the trial judge, page 4 thereof, attached to respondent's return to the writ of *habeas corpus* filed in the Supreme Court of California, shows that if the District Attorney would be satisfied with life imprisonment, it would be satisfactory to the court.

In the affidavit of Ted C. Sten, the Deputy District Attorney in charge of the Long Beach branch office of the District Attorney, which affidavit is attached to respondent's said return, it appears that he at all times advised counsel for petitioner in his discussions with him that the death penalty should be inflicted and such was the settled conclusion of the District Attorney's office.

In the affidavit of Deputy District Attorney Clarence S. Hunt, which affidavit is attached to respondent's said return, it appears that he was to assist Mr. Sten in the prosecution of the case; that he informed counsel for petitioner that, not being in charge of the case, he could make no statement which would be binding on the District Attorney's office, but that it appeared to him that if defendant entered a plea of guilty and a life sentence were imposed, the ends of justice would be properly served.

In the affidavit of Erling J. Hovden, Deputy Public Defender, which affidavit is attached to the petition for a writ of *habeas corpus* in the state court, it appears that he and Mr. Sten met and consulted with the court at which time Mr. Sten, after outlining the evidence, stated that the position of the District Attorney's office was that the death penalty should be inflicted; that after further conversation, the court stated that in view of the position taken by the District Attorney, it was better that the case be tried under defendant's plea of not guilty (p. 7); that on the morning the case was called for plea upon the amended indictment, the court told him that if defendant entered a plea of guilty, the court may have to impose the death penalty. (P. 12.)

From the foregoing it thus appears that the court had not made up its mind prior to the plea of guilty to impose a life sentence, but stated merely that if such sentence was satisfactory to the District Attorney, it would be satisfactory to the court.

Petitioner, on page 6 of his brief, states that he was led to his doom as a result of assurances by a state-appointed attorney, following a series of conferences with the trial

court, and after considerable negotiations in which life of the defendant was the pawn and which resulted in the plea of guilty and the sentence of death.

Such statement reflects upon the judicial integrity of the courts of the State of California. The mere fact that petitioner entered a plea of guilty did not of itself bring about the sentence of death. The greater part of three days was spent by the trial judge in hearing the evidence on said matter (*In re Hough*, 24 A. C. 529), which evidence is fully set forth by the Supreme Court in its decision on the appeal from the judgment. (*People v. Hough*, 24 A. C. 530.) Petitioner's "doom" did not result from assurances by a state-appointed attorney but resulted from the evidence against him. Furthermore, the so-called state-appointed attorney made no assurances. He only advised petitioner that, from the several conversations he had had with the trial court and the Deputies District Attorney, he did not believe the death penalty would be imposed and could not conceive of the imposition of the extreme penalty on a plea of guilty. (Supplemental Affidavit of Erling J. Hovden.)

Petitioner argues in his brief, page 10, that the statute creating the office of Public Defender is unconstitutional because he is paid by the state which, through its legislature, fixes his salary and he must satisfy the members of that body or his salary may be lowered or the office abolished.

This contention lacks all semblance of legal soundness. Furthermore, the constitutionality of the statute was not raised in the Supreme Court of California and therefore was not passed upon by that court. However, even from

a practical standpoint, petitioner's contention lacks merit. We direct attention to the fact that the Public Defender of Los Angeles County prosecuted the appeal in the instant case before the Supreme Court of California. (*People v. Hough, supra.*) The record will show that all briefs filed on behalf of William Leva Hough were prepared by the Public Defender and not by his present counsel, whose name also appears in the official report as counsel for the appellant. The fact that petitioner's present counsel, who entered the case subsequent to the filing of briefs by the Public Defender, did not file any additional brief on behalf of appellant, would seem to prove that the Public Defender had thoroughly presented appellant's case to the Supreme Court. In the decision on the writ that court said: "Petitioner's present attorney referred to Mr. Hovden in his argument as a 'high class attorney,' 'a courageous public defender' and that he 'had no criticism of Mr. Hovden.'" (*In re Hough,* 24 A. C. 525.)

In the following recent cases the Public Defender of Los Angeles County succeeded on appeal in reversing the convictions in the lower court:

People v. Rogers, 22 Cal. (2d) 787 (murder, death penalty);

People v. Lynch, 60 Cal. App. (2d) 133 (burglary);

People v. Rayol, 65 A. C. A. 653 (immoral act);

People v. Orloff, 65 A. C. A. 870 (robbery).

Honorable Charles Evans Hughes in an address before the American Bar Association said: "In our great cities the time honored practice of assigning counsel is not in good repute."

Honorable William Howard Taft declared in a preface to a pamphlet on legal aid published by the United States Department of Labor in 1926: "I think that we shall have to come, and ought to come, to the creation in every criminal court of the office of Public Defender, and that he should be paid out of the treasury of the county or the state."

There is pending before Congress House Resolution 676, 78th Congress, 1st Session, which if adopted will provide for a Public Defender in the Federal courts.

The record in the instant case does not support petitioner's contention that the Public Defender persuaded, coerced, or induced him to enter a plea of guilty or misinformed him as to the punishment he would receive if he entered a plea of guilty. The only matter petitioner was not advised of by the Public Defender was the statement made by the court that if defendant pleaded guilty, the court may have to impose the death penalty. The failure to thus advise petitioner did not render the judgment void under the due process clause of the Fourteenth Amendment. And the court, not knowing what advice petitioner had received from his counsel, was under no legal duty or obligation to announce in open court that if defendant entered a plea of guilty the death penalty may be imposed.

Authorities.

The authorities cited, on pages 16 and 17 of the petition, to sustain jurisdiction for the issuance of a writ of certiorari do not aid petitioner.

In *Mooney v. Holohan*, 294 U. S. 103, it was claimed that the conviction rested solely on perjured testimony which was knowingly used by the prosecuting authorities in order to obtain that conviction.

In *Lisenba v. People of State of California*, 314 U. S. 219, the important question was whether the use of confessions rendered petitioner's conviction a deprivation of his life without due process of law.

In *Powell v. State of Alabama*, 287 U. S. 45, the court appointed all the members of the bar and not any particular attorney to represent defendants, and the defendants claimed that under such appointment they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.

In *Whitney v. People of State of California*, 274 U. S. 357, it was stated that:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a State court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court."

In *Stromberg v. People of State of California*, 283 U. S. 359, the constitutionality of the state statute was

raised and passed upon by the state court. So, also, in the case of *Fisks v. State of Kansas,* 274 U. S. 380.

In *Patterson v. State of Alabama,* 294 U. S. 600, the question before the court was the right of the State Supreme Court to strike defendant's bill of exception on the ground that it had not been presented in time, and this honorable court said: "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires."

In *Ashcraft v. State of Tennessee,* 64 S. Ct. 921, this honorable court reversed the judgment of conviction and remanded the case to the state court for further proceedings on the ground that the confession was not voluntary but compelled.

In *Hebert v. State of Louisiana, 272* U. S. 312, this honorable court affirmed the judgment of conviction in the state court where the defendant was convicted under the state law making it a criminal offense to manufacture intoxicating liquor for beverage purposes. The court held that the defendant could be prosecuted under both the state and federal laws for the offense.

In *Brown v. State of Mississippi, 297* U. S. 278, the question was whether convictions, which rested solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

In *Moore v. Dempsey,* 261 U. S. 86, on appeal from an order of the District Court for the Eastern District of

Arkansas dismissing a writ of *habeas corpus* upon demurrer, this honorable court held that the District Judge should find whether the facts alleged were true and whether they can be explained so far as to leave the state proceedings undisturbed. The facts alleged in the petition for the writ showed that the trial was had under mob domination.

Petitioner cites the additional authority of *Glasser v. United States,* 315 U. S. 60, on page 9 of his brief, in support of his statement that he did not have the effective aid of counsel. In that case there were several defendants and the court appointed the attorney representing one of the defendants to represent another of the defendants where their interests were conflicting and which produced cross-purposes as to these defendants in the cross-examination of government witnesses, thereby resulting in no cross-examination on behalf of one of such defendants.

Conclusion.

Thus, after reviewing the authorities cited by petitioner, it is obvious that the situation as presented by the record in the instant case is not at all comparable to the facts in any of those cases where this honorable court held that the defendant was denied the effective aid of counsel.

The facts in the instant case show that the Public Defender, to the best of his ability, tried to persuade the District Attorney's office to agree to a life sentence if defendant entered a plea of guilty; that his efforts in this regard were unsuccessful; that not losing all hopes to accomplish this result, the Public Defender beseeched the trial court to impose life imprisonment if a plea of guilty

were entered, which the trial court refused to do without approval of the District Attorney; that as a last resort, after the trial court had advised that the defendant be tried under his pleas of not guilty and not guilty by reason of insanity, the Public Defender, apparently believing that under the evidence a verdict of guilty without recommendation of life imprisonment would be rendered by a jury, advised the defendant to plead guilty and place all the mitigating circumstances, if any, before the court, trusting that under the evidence and upon the previous conversations he had had with the court and Deputies District Attorney, the defendant might receive life imprisonment. The fact that all of such efforts of the Public Defender did not bring about the desired result is no ground for holding that defendant was denied the effective aid of counsel.

Since the constitutionality of the statute creating the office of Public Defender and prescribing his duties was not raised or passed upon by the state court, petitioner may not for the first time present this matter to this honorable court for determination.

Wherefore, respondent believes that the petition herein for writ of certiorari should be denied.

Respectfully submitted,

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and
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